Petition

No. 81-994

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In The

Supreme Court of the United States

October Term, 1981

SIEMENS AMERICA, INC., ET AL.,

Petitioners,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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QUESTIONS PRESENTED FOR REVIEW

I. May the majority of the United States Court of Customs and Patent Appeals construe a tariff provision in derogation of statutory mandate?

(a) May the majority of the United States Court of Customs and Patent Appeals revive a "rule" of convenience used in construing tariff provisions, when the same court had previously discredited that "rule" and Congress enacted legislation eliminating resort to it?

(b) Did the majority of the United States Court of Customs and Patent Appeals err in holding that item 685.90, TSUS, more specifically describes the merchandise in this case than does item 687.60, TSUS, despite legislative history, statutory evidence and established case law to the contrary?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are the petitioners and the respondent herein. (Siemens Corporation is the successor in interest to Siemens America, Inc.)

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OPINIONS BELOW

The opinion of the United States Court of Customs and Patent Appeals in this case is unofficially reported at 653 F. 2d 471 (1981), and will be officially reported in Volume 68 of the reports of that court.

The appellate court's opinion incorporates by reference certain portions of the trial court opinion by the former United States Customs Court (now the United States Court of

International Trade[1]) in Customs Decision 4856 ("C.D. 4856"), dated May 13, 1980, which is officially reported at 84 Cust. Ct. 180 (1980), and is also unofficially reported at 496 F. Supp. 266 (1980).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1256. The decision and judgment of the United States Court of Customs and Patent Appeals here questioned is Customs Appeal Decision 1266 ("C.A.D. 1266"), which was dated and entered June 25, 1981. The petitioner timely moved for rehearing pursuant to Rule 6.1 of the court below, and the motion was denied by that court on August 27, 1981, without opinion. The time for filing this petition will expire on November 25, 1981.

STATUTES INVOLVED

Tariff Schedules of the United States ("TSUS"), as amended by Public Law 89-241, 79 Stat. 933, 946, and as modified by Presidential Proclamation 3822, 32 F.R. 19002, and as in effect on the dates of entry of the merchandise before this Court (19 U.S.C. §1202):

GENERAL HEADNOTES AND RULES OF INTERPRETATION

* * *

10. *General interpretative rules* - For the purposes of these schedules —

* * *

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1. Public Law 96-417.

(c) an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it; but, in applying this rule of interpretation, the following considerations shall govern:

(i) a superior heading cannot be enlarged by inferior headings indented under it but can be limited thereby;

(ii) comparisons are to be made only between provisions of coordinate or equal status, i.e., between the primary or main superior headings of the schedules or between coordinate inferior headings which are subordinate to the same superior heading;

* * *

SCHEDULE 6. METALS AND METAL PRODUCTS

* * *

Part 5 - ELECTRICAL MACHINERY AND EQUIPMENT

685.90 Electrical switches, relays, fuses, lightning arresters, plugs, receptacles, lamp sockets, terminals, terminal strips, junction boxes and other electrical apparatus for making or breaking electrical circuits, for the protection of electrical circuits, or for

making connections to or in electrical circuits; switchboards (except telephone switchboards) and control panels; all the foregoing and parts thereof. [*See* "Staged TSUS Rate Modifications" *infra.*]

Electronic tubes (except X-ray tubes): photocells; transistors and other related electronic crystal components; mounted piezoelectric crystals; all the foregoing and parts thereof:

* * *

687.60 Other [than television picture tubes] [*See* "Staged TSUS Rate Modifications" *infra.*]

Staged TSUS Rate Modifications
Proc. No. 3822, Dec. 16, 1967, 32 F.R. 19002

* * *

TSUS No.	Rate of duty, effective with respect to articles entered on or after January 1, -.			
	1969	1970	1971	1972 to 1979
685.90	14% ad val.	12% ad. val.	10% ad val.	8.5% ad val.
***				
687.60	10% ad val.	8.5% ad. val.	7% ad val.	6% ad val.

STATEMENT OF THE CASE

Petitioners are importers of certain electronic tubes, known as "Surge Voltage Protectors" (hereinafter "SVPs") used in circuit protection and other applications.[2] While this petition is directed to the rate and amount of duties charged against a series of importations of such tubes made by petitioners between 1969 and 1978,[3] it addresses issues of far greater scope raised by the decision below.

The United States Customs Service determined that SVPs are not "Electronic tubes" as described in item 687.60, TSUS, and assessed them at the rate provided for "other . . . electrical apparatus for the protection of electrical circuits" under item 685.90, TSUS.

After exhaustion of all administrative remedies, petitioners brought a series of civil actions in the United States Customs Court pursuant to former 28 U.S.C. §1582 (1970), to obtain refund of excessive duties paid. The jurisdiction of that court over the subject matter of this action is unchallenged. Thirteen

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2. The record indicates that SVPs may be used for, among other things, the generation of pulses to switch equipment and the discharge of capacitors (R 167, 170, Defendant's Exhibit B).

3. Petitioners contend that between July, 1970 and December, 1972 a practice existed of assessing SVPs as electronic tubes under item 687.60, TSUS. The entries of merchandise so classified are not now in issue. The legal effect of the existence of the practice was presented to the trial court but was not the subject of its original decision (C.D. 4856). The appellate court remanded this question, *inter alia*, to the trial court which issued an opinion on the subject without notice to the parties (Slip Opinion 81-91). At the time of entry of judgment as reported in Slip Opinion 81-91, petitioners had not yet applied to this Court for a writ of certiorari. Petitioners have taken appropriate action to vacate the judgment and to stay further proceedings on that issue.

civil actions were consolidated for submission and decision by Judge Bernard Newman.

The rate and amount of duties to be paid on importations of merchandise depends upon the tariff classification of the merchandise, as set forth in the "Tariff Schedules of the United States" ("TSUS"), 19 U.S.C. §1202.

Petitioners claimed that the imported merchandise is described in item 709.66, TSUS, as "[a]pparatus based on the use of radiations from radioactive substances," and should have been assessed at the rate provided thereunder. In the alternative, petitioners claimed that the SVPs are described in item 687.60, TSUS, as "Electronic tubes" and should have been assessed with duty as provided thereunder. In C.D. 4856, Judge Newman found that the SVP tubes were properly described as "Electronic tubes" under item 687.60, TSUS, as claimed by petitioners, and that item 687.60 more specifically describes these tubes than item 685.90.

The United States, defendant below, appealed from the decision and judgment of the United States Customs Court, reasserting its claim that the merchandise is not covered by item 687.60 and should be classified under item 685.90, TSUS.[4] In the alternative, it claimed that item 685.90, TSUS, was a more specific provision than item 687.60.

The Court of Customs and Patent Appeals found the merchandise to be described in both provisions, but reversed the

4. Petitioners cross-appealed from the decision in C.D. 4856 (which held item 709.66, TSUS, to be inapplicable to SVPs) inasmuch as the trial court opinion was the first interpretation of the scope of item 709.66, TSUS, and raised an important case of first impression. The appellate court sustained the trial court on this point. Petitioners do not request certiorari on this point but solely on the questions presented herein.

lower court's holding concerning "relative specificity" by a 3 to 2 vote, Judge Helen Nies, joined by Chief Judge Howard Markey, vigorously dissenting. Petitioners petitioned the Court of Customs and Patent Appeals for rehearing but this request was denied.

SUMMARY OF ARGUMENT

The holding of the majority that item 685.90, TSUS, more specifically describes the merchandise because it is a use provision, than does item 687.60, TSUS, which is an *eo nomine* provision, invalidates statutory mandate and established case law, including the decision of this Court in *Fink v. United States,* 170 U.S. 584 (1898). It revives the discredited and repealed "rule" of tariff statute interpretation which holds that a provision which describes merchandise by use must be deemed more specific than a provision which describes the same merchandise by name. This case is important because the holding of the court below impacts not only on the merchandise and provisions before it, but on a host of other tariff provisions which describe articles specifically by name and which will be rendered moot because there exist use provisions also describing the same merchandise.

The two tariff provisions in issue here are themselves of great concern to international trade and the electronics industries. Item 685.90, TSUS, is the provision which embraces, *inter alia,* switches, relays, and generally electrical apparatus for making or breaking electrical circuits, for the protection of electrical circuits, for the making of connections to or in electrical circuits, switchboards and control panels. Item 687.60, TSUS, encompasses electronic tubes, transistors, and integrated circuits, all of which are vital components used in computers, radios, television, communications satellites, watches, scientific instruments and a host of other electronic articles These two

provisions cover products of great importance to electronics industries of the United States and its trading partners. The change in the interpretation of these provisions brought about by the decision of the Court of Customs and Patent Appeals will cause great disruption in the marketplace and will affect not only the collection of duties by the United States Customs Service but also the performance of functions by the United States Trade Representative, the United States International Trade Commission, and other agencies of the Government in connection with obligations of the United States arising under the General Agreement on Tariffs and Trade ("GATT") and other international agreements. Thus, while the issues before this Court specifically involve the classification of certain imported merchandise, the holding of the majority of the court below has far-reaching implications and repercussions.

REASONS FOR GRANTING THE WRIT

I.

The decision of the court below will result in the disruption of international trade by the improper classification of countless products pursuant to the "rule" that a use provision prevails over an *eo nomine* provision.

If the decision of the court below is allowed to stand, it will have serious repercussions on international trade because it produces uncertainty regarding how articles vital to the electronics and other industries will be classified for tariff purposes, and therefore, regarding how much duty will be paid on such merchandise.

The reasoning of the court below requires that merchandise be classified by use regardless of the fact that the merchandise may be described by name in an *eo nomine* tariff provision. The

court's reasoning would throw into limbo the classification of transformers (items 682.05 and 682.07), rectifiers (item 682.60), capacitors (item 685.80), resistors (item 686.10), voltage regulators (items 686.22 and 686.24), electronic tubes, photocells and semiconductors, including transistors, integrated circuits (chips) and similar components (item 687.60).

The impact of that reasoning on the first provision of schedule 6, part 5, TSUS, alone illustrates that absurd results will obtain if the decision of the court below is followed. The first superior heading in schedule 6, part 5, provides for:

> Generators, motors, motor generators, converters (rotary or static), transformers, rectifiers, and rectifying apparatus, and inductors; all the foregoing which are electrical goods, and parts thereof.

The language of the heading is inherently ambiguous as to whether it is a use provision or an *eo nomine* designation and as to whether each item must be viewed individually in that respect.

If the entire provision, or the individual descriptions for converters, transformers, rectifiers and rectifying apparatus, and inductors, were found to be "use" provisions, then photocells described in item 687.60, TSUS, will be classified as "generators" in item 682.60, some electronic tubes, all diodes, and some transistors will be classified as rectifiers (item 682.60) and some others as transformers (items 682.05 and 682.07). On the other hand, if the same superior heading is deemed to be an *eo nomine* designation, then transformers (items 682.05 and 682.07), rectifiers and inductors (item 682.60), some capacitors (item 685.80), resistors (item 686.10), voltage regulators (items 686.22 and 686.24), and some electronic tubes, diodes, transistors, integrated circuits (chips) described in item 687.60 by name, will

all be classified in item 685.90, TSUS, due to their use as "apparatus . . . for the protection of electrical circuits."

Even more dramatic is the effect of the lower court's reasoning upon the products described in item 687.60, most significantly upon integrated circuits (chips) used in all facets of electronics usage. Although certain integrated circuits (chips) are simple devices of generalized usage which merely make connections in electrical circuits (a use described in item 685.90, incidentally), many reach a state of sophistication to the point that they constitute the entire "guts" of products such as computers (item 676.15), calculators (item 676.15), television apparatus (item 685.20), Citizen Band (CB) radio transceivers (item 685.29), electrical measuring, checking, analyzing, or automatically controlling instruments (items 712.05-51), and electromedical apparatus (items 709.15 and 709.17). Since these chips are the "substantially complete" articles,[5] are the chips to be classified as such articles on a "use" theory?

It quickly becomes clear that the appellate court's decision will effectively moot many *eo nomine* provisions, and cause great uncertainty as to how imported merchandise should be classified for tariff purposes. This result clearly contravenes the legislative intent in enacting these *eo nomine* provisions and negates the well-recognized presumption that Congress does not use superfluous words in a statute. *Platt v. Union Pacific*

5. Whether merchandise is a "substantially complete" article depends upon five factors: (1) comparison of the number of omitted parts with the number of included parts; (2) comparison of the time and effort required to complete the article compared with the time and effort required to place it in its imported condition; (3) comparison of the cost of the included parts with that of the omitted parts; (4) the significance of the omitted parts to the overall functioning of the completed article; and (5) trade customs. *See Daisy-Heddon v. United States*, 66 CCPA 97, C.A.D. 1228, 600 F. 2d 799 (1979), *aff'g*, 81 CCR 55, C.D. 4765, 460 F. Supp. 680 (1979); *General Electric Co. v. United States*, 86 Cust. Ct. ___, Slip Op. 81-78, ___ F. Supp. ___ (August 26, 1981).

Railroad, 99 U.S. 48 (1878); *Ameliotex, Inc. v. United States*, 65 CCPA 22, C.A.D. 1200, 565 F. 2d 674 (1977).

Therefore, the decision of the court below cannot be allowed to stand. The lower court committed reversible error by not following the intent of Congress manifested in Rule 10(c) to determine which of the two competing provisions should prevail. It erred by disregarding this Court's decision in *Fink v. United States* and the many other decisions which clearly set forth parameters for determining "relative specificity" in a manner consistent with the intent of Congress.

II.

The court below determined the "relative specificity" of the two tariff provisions at issue in disregard of the statutory mandate of General Interpretative Rule 10(c).

The trial court was correct in relying on Rule 10(c) to determine the "relative specificity" of items 687.60 and 685.90, TSUS, and, as the minority of the appellate court found, in not resorting to the "rule" that a use provision is generally more specific than an *eo nomine* provision. The majority of the Court of Customs and Patent Appeals erred in reversing that decision.

Rule 10(c) provides that an imported article which is described in two or more provisions of the TSUS is classifiable in the provision which most specifically describes the article and that comparisons for purposes of "relative specificity" shall be made only between provisions of coordinate or equal status. In this case, the sections of the two provisions of coordinate or equal status which must be compared and which appear in the main superior headings are "Other . . . electrical apparatus for the protection of electrical circuits" (item 685.90) and "Electronic tubes (other than X-ray tubes)" (item 687.60).

The legislative history of the Tariff Schedules of the United States[6] clearly indicates that Congress enacted Rule 10(c) in order to settle questions arising when an article is provided for in two or more overlapping provisions. The *Tariff Classification Study* ("TCS") of November 15, 1960 was published by the Tariff Commission prior to the passage of the Tariff Classification Act of 1962, in which Rule 10(c) first appeared, and is unquestionably the authoritative legislative history of the TSUS. The *TCS Proposed Schedules and Index* (November 15, 1960) at 47 states:

> Determination of which one of the competing provisions applies to the article at hand is made by means of the rules of relative specificity and other rules of construction.[7]

Since the enactment of Rule 10(c) in 1963, the courts have consistently held that Rule 10(c) should govern the question of "relative specificity."[8] For example, in *F.L. Smidth & Co. v. United States*, 56 CCPA 77, 84-85, C.A.D. 958, 409 F. 2d 1369

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6. 19 U.S.C. § 1202, enacted pursuant to the Tariff Classification Act of 1962, 76 Stat. 72, proclaimed in effect as of August 31, 1963 by Presidential Proclamation 3548 of August 21, 1963, 28 F.R. 9279.

7. By "other rules of construction," Congress clearly intended the other statutory rules of construction set out in General Interpretative Rule 10, TSUS.

8. *Travenol Laboratories, Inc. v. United States*, 67 CCPA 35, C.A.D. 1247, 622 F. 2d 1027 (1980), *aff'g*, 83 Cust. Ct. 1, C.D. 4812, 476 F. Supp. 1075 (1979) may at first glance appear to be an exception. However, in that case the two provisions in issue were item 709.27, TSUS, which covers medical apparatus and item 772.65, TSUS, which covers tubing not specially provided for. Rule 10(c) was not applicable since item 709.27, TSUS, specifically provides for the merchandise and therefore the merchandise could not be "not specially for" under item 772.65.

(1969), *aff'g*, 59 Cust. Ct. 276, C.D. 3141 (1967), the Court of Customs and Patent Appeals stated:

> Relative specificity is now made an express part of the legislation.
>
> * * *
>
> This appears to us to mean this: if an article is determined to be clearly described in two or more items, selection of the controlling item by relative specificity is mandatory and takes precedence over other judge-evolved methods of resolving ambiguity. . . .

In *United States v. Simon Saw & Steel Co.*, 51 CCPA 33, C.A.D. 834 (1964), decided after the enactment of the Tariff Schedules and Rule 10(c) but involving predecessor law, the Court of Customs and Patent Appeals reviewed the development of the basis for the rule of "relative specificity" in prior case law as follows (at 40):

> In the *Electrolux* case, supra, this court held that the more specific provision is the one having requirements which are more difficult to satisfy. And in *Fink v. United States*, 170 U.S. 584, 586-87 (1898), the Supreme Court effectively stated the logical basis for the rule of relative specificity when it said:
>
> > . . .Being reached, then, in some of its aspects by some of the provisions found in both paragraphs, the question is, which, if either of the two, is so dominant in its control of the article in question as

> to exclude the operation thereon of the other. The rule is that this, if possible, is to be determined by ascertaining whether one of the two paragraphs is more definite in its application to the article in question than is the other. . . .
>
> In other words, the paragraph that provides for the article with the greatest degree of accuracy and certainty is the more specific provision.

In the *Fink* case, this Court determined that muriate of cocaine was more specifically provided for in paragraph 74 of the Tariff Act of October 1, 1890, as a medicinal preparation than in paragraph 76 of that statute as a chemical salt. The Supreme Court found that (at 771):

> muriate of cocaine is, in its narrow aspect, a medicinal preparation; in its wider, a chemical salt; and, hence, that "chemical salt" is a generic term designating all articles of that character, and hence, embracing muriate of cocaine, as the genus, must, as a matter of course, contain within itself the species which are embodied in it. . . .

Applying that reasoning to the case at hand, the analogy must be drawn that "apparatus . . . for the protection of electrical circuits" is a generic term embracing all such apparatus including the "species", "electronic tubes."

Thus, as this Court has made it clear, the key to resolving the issue of "relative specificity" lies in determining which provision describes the merchandise more accurately and narrowly or, in other words, which provision has requirements

which are more difficult to satisfy.[9] That is exactly what Congress mandated and legislated by the enactment of Rule 10(c).

While the majority of the Court of Customs and Patent Appeals in the case at hand recognized that this test should be used to determine whether item 687.60, TSUS, or item 685.90, TSUS, more specifically describes the merchandise at issue, the majority did, in fact, decide the issue simply on the basis that item 685.90 is a use provision while item 687.60 is an *eo nomine* provision (68 CCPA at ___ , C.A.D. 1266, 653 F. 2d at 478):

> The SVPs are described in item 685.90 by their specific and only use, i.e., circuit protection. Item 687.60 is not limited to any such specific requirement. Comparing the two competing provisions, both of which are quite broad in their reach, it is clear that the use provision, item 685.90, is "undoubtedly more restrictive and 'difficult to satisfy.'" Therefore, the SVPs are more specifically described in item 685.90.

The Court below then stated that this result is supported by the "rule" that a use provision generally prevails over an *eo nomine* provision. *Ibid.*

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9. Numerous cases have recognized that the use of this test is the proper means of resolving the "relative specificity" issue pursuant to Rule 10(c). *Ozen Sound Devices v. United States*, 67 CCPA ___, C.A.D. 1246, 620 F. 2d 880 (1980); *F. L. Smidth & Co., supra; Arthur J. Humphreys, et al. v. United States*, 56 CCPA 67, C.A.D. 956, 407 F. 2d 417 (1969); *Stella D'Oro Biscuit Co., Inc. v. United States*, 79 Cust. Ct. 28, C.D. 4709, 436 F. Supp. 400 (1977), *aff'd per curiam*, 65 CCPA 52, C.A.D. 1205, 570 F. 2d 945 (1978); *Knowles Electronics, et al. v. United States*, 71 Cust. Ct. 112, C.D. 4483 (1973), *aff'd*, 62 CCPA 1, C.A.D. 1134, 504 F. 2d 1403 (1974); *C. J. Tower & Sons of Buffalo, Inc. et al. v. United States*, 69 Cust. Ct. 105, C.D. 4379, 351 F. Supp. 604 (1972), *aff'd*, 61 CCPA 74, C.A.D. 1124, 496 F. 2d 1219 (1974).

The majority's reliance on the "rule" that a use provision generally prevails over an *eo nomine* provision is misplaced since that "rule" of tariff statute interpretation has been laid to rest by Congress with the enactment of Rule 10(c).

III.

The court below improperly held that item 685.90, TSUS, more specifically describes the merchandise at issue than does item 687.60, TSUS.

Both the trial court and the appellate court agreed on the meaning of the provision for "Electronic tubes" in item 687.60, TSUS, and that the SVPs in issue fall within this common meaning. 84 Cust. Ct. at 189, C.D. 4856, 496 F. Supp. at 272; 68 CCPA at ___, C.A.D. 1266, 653 F. 2d at 477.

The enactment of Rule 10(c) by Congress in 1963 was a recognition of the problem of overlapping tariff provisions in the TSUS. The legislative history of the TSUS shows that Congress also recognized that "[t]he only way to reduce the number of these overlapping provisions is to increase the number of specific enumerations."[10] Item 687.60, TSUS, is derived directly from the "parts" section of the provisions of Paragraph 353, Title 1, schedule 3 of the Tariff Act of 1930, Pub. No. 73-361, as amended by T.D. 55816, which, as modified by trade agreement, specifically enumerated electronic tubes. The provision for "apparatus . . . for the protection of electrical circuits," incorporated as part of item 685.90, TSUS, arose with the advent of the Tariff Schedules and was derived from the "basket" provisions[11] of paragraph 353.

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10. *TCS Proposed Schedules and Index, supra.* at 47.

11. The term "basket" describes a provision qualified by the language "All . . . not specially provided for."

The language of both provisions clearly indicates that the headings were modelled after the corresponding provisions in the Brussel Nomenclature.[12] It has been recognized that where the language of the Tariff Schedules is the same as or closely similar to the corresponding provision in the Brussels Nomenclature, the Brussels Nomenclature may be used as an aid to interpreting provisions of the TSUS. *United States v. Abbey Rents*, 66 CCPA 2, 4 n. 5, C.A.D. 1213, 585 F. 2d 501, 504 n. 5 (1978); *F.L. Smidth & Co.*, 56 CCPA at 84, C.A.D. 958, 409 F. 2d at 1375; and Ruth F. Sturm, *Customs Law and Administration*, 382 (1980).

The provisions involved here are set forth below:[13]

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12. The "Brussels Nomenclature," which was drafted by the Customs Cooperation Counsel, an international organization, sets forth a classification system for merchandise handled in international trade. The system was intended for use by adopting member nations in the hope that international trade would be facilitated by uniformity of phraseology. While the Tariff Commission did not recommend adoption of the Brussels Nomenclature, the Commission did adopt much of the Brussels phraseology in some of its schedules. *F. L. Smidth & Co.*, 56 CCPA at 83-84, C.A.D. 958, 409 F. 2d at 1375. The legislative history of the Tariff Schedules acknowledged this reliance on the Brussels Nomenclature, stating that the Brussels Nomenclature "exerted the greatest influence on the arrangement of the proposed revised schedules." *TCS Proposed Schedules and Index* at 8.

13. That the language of item 685.90, TSUS, is derived from Brussels Nomenclature heading 85.19 was recently recognized by the United States Court of International Trade in *Kyocera International Inc. v. United States*, 84 Cust. Ct. ___, Slip Op. 81-79, ___F. Supp.___ (September 11, 1981), *appeal pending*, C.A. 82-6.

Item 687.60	Heading 85.21
Electronic tubes (except X-ray tubes): photocells; transistors and other related electronic crystal components; mounted piezoelectric crystals; all the foregoing and parts thereof:	Thermionic, cold cathode and photocathode valves and tubes (including vapour or gas-filled valves and tubes, cathode-ray tubes, television camera tubes and mercury arc rectifying valves and tubes); photocells; crystal diodes, crystal triodes and other crystal valves (for example, transistors); mounted piezoelectric crystals.
* * *	
Other —	
Item 685.90	Heading 85.19
Electrical switches, relays, fuses, lightning arresters, plugs, receptacles, lamp sockets, terminals, terminal strips, junction boxes and other electrical apparatus for making or breaking electrical circuits, for the protection of electrical circuits, or for making connections to or in electrical circuits; switchboard (except telephone switchboards) and control panels; all the foregoing and parts thereof.	Electrical apparatus for making and breaking electrical circuits, for the protection of electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, lightning arresters, surge suppressors, plugs, lampholders, terminals, terminal strips and junction boxes); resistors, fixed or variable (including potentiometers), other than heating resistors; rheostatic, inductance, motor driven and vibrating contact automatic voltage regulators; switchboards (other than telephone switchboards) and control panels.

Heading 85.21 specifically and unambiguously provides for electronic tubes, both of the thermionic (hot cathode) and cold cathode type. Both the trial court and the court below found that the SVPs are "cold cathode tubes" and therefore are definitionally electron tubes.[14] Heading 85.21 differs from item 687.60 only in that the Brussels Nomenclature heading enumerates specific types of electronic tubes, whereas the superior heading of TSUS item 687.60 provides for all electronic tubes. The scope of the provisions, however, is the same, since it is a well-settled rule that an *eo nomine* designation covers all forms of an article, absent proof of legislative intent to the contrary. *United States v. National Carloading Corp. et al.*, 48 CCPA 70, 74, C.A.D. 767 (1961); *Nootka Packing Co. v. United States*, 22 CCPA 464, 466, T.D. 47464 (1935).

The legislative history of the provisions clearly indicates that Congress intended that the SVPs should be classified as "Electronic tubes" under item 687.60, TSUS, rather than as "apparatus . . . for the protection of electrical circuits" under item 685.90, TSUS. In addition, the legislative history of Rule 10(c) indicates that Congress intended the demise of the "doctrine of use." As held in *United States v. Electrolux Corporation*, 46 CCPA 143, 147, C.A.D. 718 (1959), *aff'g*, 40 Cust. Ct. 37, C.D. 1955 (1958), the application of the "doctrine of use" is error, in the presence of a clearly expressed legislative intent or a competing provision which is clearly more specific than the "use" provision. In this case, the application of the "doctrine of use" is double error because such application is contrary to the expressed legislative intent of both item 687.60 and Rule 10(c).

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14. Judge Newman found that "the record establishes that the imports are cold cathode tubes, which by definition are electron tubes." 84 Cust. Ct. at ___, C.D. 4856, 496 F. Supp. at 272. The appellate court adopted as its own the portion of Judge Newman's opinion dealing with this point. 68 CCPA ___, C.A.D. 1266, 653 F. 2d at 477.

In any case, it is obvious that the statutory rule of "relative specificity" promulgated in Rule 10(c) requires that the merchandise be classified under item 687.60, TSUS. The minority of the court below correctly found that the trial court was correct in holding that the provision for "Electronic tubes" in item 687.60, TSUS, more specifically describes the SVPs than "the general catch-all, basket-like provision in item 685.90 covering 'other electrical apparatus... for the protection of electrical circuits.'" 68 CCPA at___, C.A.D. 1266, 653 F. 2d at 479. The dissenting opinion recognized that "it is more difficult to satisfy the requirements of a single kind of device (an electronic tube) than it is to satisfy the requirements of *any one* of many different kinds of devices (fuses, circuit breakers, lightning arresters, insulators, transformers, carbon block assemblies, carbon arresters, gas tubes, neon bulbs, zener diodes, varistors, selenium rectifiers, and so forth), especially considering that such highly diverse devices function differently and have no common physical criteria." 69 CCPA at ____, C.A.D. 1266, 653 F. 2d at 478-79.

Obviously, the requirements of "Electronic tubes" are more difficult to satisfy than those of "apparatus . . . for the protection of electrical circuits." While different types of electronic tubes exist, it is clear that Congress specifically provided for all electronic tubes with the clear intent, as shown by a comparison to the relevant provision of the Brussels Nomenclature, that all such tubes, including SVP tubes, be classified as such, regardless of their application. Congress apparently recognized that such tubes are basically one kind of device, used for a variety of functions, including the protection of electrical circuits.

The provision in item 685.90, TSUS, for "apparatus . . . for the protection of electrical circuits," on the other hand, describes hundreds of different apparatus and

thousands of varieties thereof. Significantly, all "electronic tubes" can be used for purposes enumerated in item 685.90, TSUS (the protection of circuits, the making and breaking of circuits, etc.). It is therefore clear that the court below erred in finding that item 685.90, TSUS, more specifically describes the SVPs than does item 687.60, TSUS.

As the trial court properly recognized, but the court below did not, *United States v. Ampex Corp., et al.*, 59 CCPA 134, C.A.D. 1054, 460 F. 2d 1086 (1972), *rev'g*, 65 Cust. Ct. 320 C.D. 4096 (1970), is analogous to the instant case. In that case, the merchandise was certain television camera cables and the two competing provisions were item 685.20, TSUS (television apparatus and parts thereof), and item 688.15, TSUS (insulated electrical conductors with fittings). Applying the rule of "relative specificity," enunciated in Rule 10(c), the court below in *Ampex* agreed with the dissenting Judge Newman of the trial court that the *eo nomine* provision, item 688.15, more specifically described the merchandise than the use provision, item 685.20.[15] The court below quoted Judge Newman's reasonings as follows (59 CCPA at 137, C.A.D. 1054, 460 F. 2d at 1088):

> Insulated electrical conductors, although taking a variety of forms, are essentially one kind of device. Television apparatus, on the other hand, is comprised of an entire group of varied kinds of devices. . . .

See also, Stella D'Oro Biscuit Co., Inc. v. United States, 79 Cust. Ct. 28, C.D. 4709, 436 F. Supp. 398 (1977), *aff'd per*

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15. The court below erred in finding the *Ampex* case inapplicable because "it did not involve an *eo nomine* provision in competition with a use provision." 68 CCPA at ___, C.A.D. 1266, 653 F. 2d at 477 n. 5. Item 685.20, TSUS, is clearly a use provision because, according to the main superior heading, it provides for apparatus used for television transmission and reception.

curiam, 65 CCPA 52,C.A.D. 1205, 570 F. 2d 945 (1978). In that case, the Court of Customs and Patent Appeals adopted as its own the opinion of the Customs Court, written by Judge Newman, which held that "[t]he provision in item 661.30 for non-electric industrial ovens is plainly more restrictive and "difficult to satisfy" than item 666.25, which describes virtually every conceivable piece of machinery used industrially for preparing food or drink, including of course bakery ovens." 79 Cust. Ct. at 33, C.A.D. 1205, 436 F. Supp. at 401.

Finally, last but not least, the analogy to the *Fink* case, *supra*, cannot be avoided.

It is thus clear that the SVPs should be classified under item 687.60, TSUS.

CONCLUSION

For the foregoing reasons, petitioners respectfully ask this Court to grant their petition, and to issue a writ of certiorari to the United States Court of Customs and Patent Appeals. This Court should review and reverse the appellate decision below which is unlawful and contrary to the intent of Congress and affirm the trial court's decision in C.D. 4856 with instructions to enter judgment in accordance with that opinion.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Appeal No. 80-33

C.A.D. No. 1266

THE UNITED STATES,

Appellant,

v.

SIEMENS AMERICA, INC. AND SIEMENS CORPORATION,

Appellees.

Appeal No. 80-35

C.A.D. No. 1266

SIEMENS AMERICA, INC. AND SIEMENS CORPORATION,

Appellants,

v.

THE UNITED STATES,

Appellee.

Appendix A

Decided: June 25, 1981

Before MARKEY, Chief Judge, RICH, BALDWIN, MILLER, and NIES, Associate Judges.

BALDWIN, Judge.

This matter is before us on appeal by The United States (Government) and cross-appeal by Siemens America, Inc. and Siemens Corporation (collectively, Siemens) from the judgment of the United States Customs Court, now the United States Court of International Trade (court), 84 Cust. Ct. , C.D. 4856, 496 F. Supp. 266 (1980). The court held that all the imported merchandise, known as surge voltage protectors[1] (SVP), was improperly classified as "other electrical apparatus for the protection of electrical circuits" under item 685.90 of the Tariff Schedules of the United States (TSUS) and sustained Siemens' alternative claim for classification as "electronic tubes" under item 687.60, TSUS. The court also held that the SVPs containing Pm147 were not classifiable under item 709.66, TSUS, as "apparatus based on the use of radiations from radioactive substances," the provision Siemens had primarily claimed to be applicable. The rejection of classification under item 709.66 is the subject of Siemens' cross-appeal. We affirm the judgment of the court dismissing Siemens' claim under item 709.66, reverse the judgment of the court holding the SVPs properly dutiable under item 687.60, and remand this matter for further action consistent with this opinion.

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1. Some of the imported SVPs contained the radioactive substance promethium 147 (Pm147).

Appendix A

Relevant Statutes

Customs Service Classification

SCHEDULE 6. — METALS AND METAL PRODUCTS
Part 5. — Electrical Machinery and Equipment

* * * *

685.90 Electrical switches, relays, fuses, lightning arresters, plugs, receptacles, lamp sockets, terminals, terminal strips, junction boxes and other electrical apparatus for making or breaking electrical circuits, for the protection of electrical circuits, or for making connections to or in electrical circuits; switchboards (except telephone switchboards) and control panels; all the foregoing and parts thereof . . . 14, 12, 10 or 8% ad val. depending on year of entry

Siemen's Claim

SCHEDULE 7. — SPECIFIED PRODUCTS; MISCELLANEOUS AND NONENUMERATED PRODUCTS

Part 2. — Optical Goods; Scientific and Professional Instruments; Watches; Clocks, and Timing Devices; Photographic Goods; Motion Pictures; Recordings and Recording Media

* * * *

Subpart B. — Medical and Surgical Instruments and Apparatus; X-Ray Apparatus

Appendix A

* * * *

Apparatus based on the use of X-rays or of the radiations from radioactive substances, whether for medical, industrial, or other uses, and parts thereof:

* * * *

709.66 Apparatus based on the use of radiations from radioactive substances, and parts thereof . . . 9.5, 8, 7 or 6% ad val. depending on year of entry

Siemens' Alternative Claim

SCHEDULE 6. — METALS AND METAL PRODUCTS
Part 5. — Electrical Machinery and Equipment

* * * *

Electronic tubes (except x-ray tubes); photocells; transistors and other related electronic crystal components; mounted piezo-electric crystals; all the foregoing and parts thereof:

* * * *

687.60 Other . . . 10, 8.5, 7 or 6% ad val. depending on year of entry

* * * *

Part 5 headnotes:

1. This part does not cover —

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* * * *

(vi) electrical instruments and apparatus provided for in schedule 7.

Background

The SVPs in issue are gas discharge tubes consisting of a hermetically sealed glass insulator filled with argon in which two electrodes are spacially set apart. Some of the imported SVPs contain a minute quantity of Pm147 within the glass insulator. To protect electrical circuitry from damage and to protect against injury to personnel, SVPs provide a conductive path for unwanted and excessive surges of voltage caused by lightning, powerline shorts and other sources.

At a specific voltage level known as the "breakdown voltage," SVPs will switch from a nonconductive state to a conductive state quite rapidly when subjected to an excessive voltage transient. Conduction occurs when the argon within the tube becomes ionized.

In the imported SVPs containing Pm147, the radioactive material emits radiation in the form of beta particles which preionizes or facilitates ionization of the argon thus stabilizing the breakdown voltage and increasing the speed of ionization. The breakdown voltage itself is a design parameter controlled primarily by the electrode spacing and gas fill pressure of the SVPs.

According to the court below, the record clearly established that the SVPs are used for the protection of electrical circuits and are described in item 685.90 as classified by the Customs

Service (Customs). However, in accordance with headnote 1 (vi) of Schedule 6, Part 5, supra, classification under item 685.90 is precluded if the SVPs with Pm 147 are described in item 709.66 as claimed by Siemens. The court stated that the "based on" language in item 709.66 evinced a "Congressional intent to embrace merchandise in which radiation from radioactive substances is its *sine qua non.*" 496 F. Supp. at 269. From the evidence presented, the court found that the SVP's over-voltage protection function is not based upon the use of radioactive material, that the SVPs' argon ionizes irrespective of the presence of Pm147, that the speed of ionization and a specific breakdown voltage is achievable without the use of radioactive substances, and that the breakdown voltage is controlled by factors other than the presence of radiation. The court concluded that the inclusion of Pm147 in the SVPs was not essential to their basic function, that Pm147 was not a fundamental and essential constituent of the SVPs, and, therefore, that radiation is not the *sine qua non* of the SVPs in issue. Accordingly, item 709.66 did not describe the SVPs containing Pm147.

Siemens argues that since Pm147 serves to stabilize the SVPs breakdown voltage and since the breakdown voltage is an important SVP specification, the radiation from Pm147 in a SVP is an essential and fundamental determinant of SVP characteristics. Continuing, Siemens argues that the plain meaning of the words "based on" indicates that it is unnecessary that the sole characteristic of an apparatus derives from the radiation and that it is only necessary that the radiation be the underlying "basis" on which the apparatus is dependent which, according to Siemens, is clearly the case with its SVPs containing Pm147.

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Concerning whether the SVPs are described in item 687.60, the court construed the statutory language of the *eo nomine* provision for "electronic tubes" in accordance with its common meaning. According to certain technical lexicographic authorities relied upon by the court, an "electron tube"[2] is defined in terms of rudimentary but essential features, i.e., an airtight enclosure, evacuated or gas-filled, providing a medium for the flow and conduction of electrons between two electrodes. Since the SVPs satisfied those basic criteria, the tubes are described in item 687.60. Additionally, the court found that the SVPs are "cold cathode tubes" which by definition are electron tubes.

The Government maintains that the common meaning definition of the term "electronic tube" used by the lower court is incomplete and, while describing the basic physical tube components, fails to include the unique functions for which electronic tubes were developed and for which they are known. The Government argues that the function of electronic tubes is based upon the controlled flow of electrons which enables electronic tubes to assist in the performance of various functions such as amplification, conversion of alternating current to direct current, detection, rectification, and the like; therefore, the definition of electronic tubes, according to the Government, must reflect the tube characteristic of ability to control the flow of electrons and various functions performed by various electronic tubes.

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2. The parties to this appeal do not dispute that the term "electronic tube" is synonomous with the term "electron tube."

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Next the court considered the relative specificity of items 685.90 and 687.60 in accordance with General Interpretative Rule 10(c), TSUS,[3] since both items describe the SVPs in issue. According to the court, the provision that more specifically describes the SVPs is the item having requirements which are more difficult to satisfy and that item is the *eo nomine* provision for electronic tubes since electronic tubes are "essentially one kind of device" (even though they perform a variety of functions) and circuit protector apparatus are "comprised of a number of highly diverse devices" which perform different functions in circuit protection and which have no common physical criteria.

The Government contends that the court erred in finding item 687.60 more specific than item 685.90 arguing that the court failed to apply a general rule of customs jurisprudence that goods described by both a use provision and an *eo nomine* provision are more specifically provided for under the use provision unless there is a clearly expressed legislative intent to the contrary. Under the application of that rule, item 685.90 ("other electrical apparatus for the protection of electrical circuits"), a use provision, is more specific than the *eo nomine* provision for "electronic tubes" (item 687.70).

The Government also argues that the court apparently determined relative specificity by merely counting the number of items of merchandise which are encompassed by the competing provisions and that this is an improper test. The proper test,

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3. Rule 10(c) states in pertinent part that "an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it."

according to the Government, is which provision is more specific with respect to the imported article irrespective of the number of articles comprehended by the competing provisions, and the more specific provision is the one having requirements which are more difficult to satisfy.

Since the court agreed with Siemens that item 687.60 is the applicable classification over item 685.90, it found no need to address two additional issues raised by Siemens, i.e., the SVPs were properly classifiable under item 687.60 since (1) there was an established and uniform practice by Customs of classifying SVPs under that provision which was changed without requisite notice in contravention of 19 USC 1315(d);[4] and (2) three "abstract" decisions of the court held the SVPs dutiable under item 687.60 rather than item 685.90 and the doctrine of *stare decisis* controls.

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4. §1315(d) provides:

> No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption or withdrawn from warehouse for consumption prior to the expiration of thirty days after the date of publication in the weekly Treasury Decisions of notice of such ruling; but this provision shall not apply with respect to the imposition of antidumping duties or the imposition of countervailing duties under section 1303 of this title.

Appendix A

OPINION

The Item 709.66 Issue

It is axiomatic that a statute must be construed to carry out legislative intent. To determine that intent, one must first look to the statutory language itself. See, *Intercontinental Fibers, Inc. v. United States*, 64 CCPA 31, C.A.D. 1179, 545 F.2d 744 (1976). Doing so, we agree with the court below that the plain meaning of the "based on" language of item 709.66 evinces Congressional intent to limit the provision to goods in which the use of radiation is a fundamental and essential constituent. The use of radiation must be an indispensable requisite for the apparatus which, however, does not mean that the apparatus must be based solely on the use of radiation.

Thus, the issue here becomes whether or not the use of radiation from Pm147 in the imported SVPs containing such radioactive material is a fundamental and essential constituent of the SVPs.

The court below found as matters of fact that Pm147 is not a fundamental and essential constituent of the SVPs and that Pm147 radiation is not the *sine qua non* of the SVPs in issue. A finding of fact of the court below will not be disturbed unless the finding is clearly contrary to the weight of the evidence. *Pharmacia Laboratories, Inc. v. United States*, 67 CCPA , C.A.D. 1236, 609 F.2d 491 (1979). A review of the evidence of record clearly supports the findings concerning the role of Pm147 and its radiation in the operation of the SVPs. Siemens has not persuaded us otherwise.

The specific function of the SVPs is to provide a conductive path for excessive voltage transients. This function is determined

by physical characteristics of the SVPs other than radiation from radioactive substances. Ionization and thus conduction occur regardless of the presence of radiation. The breakdown voltage is determined primarily by electrode spacing and gas fill pressure. The Pm147 radiations do not determine this breakdown voltage; the radiations merely help to stabilize it and increase the speed of ionization. In fact, some of the SVPs imported by Siemens contain no radioactive material. Thus we cannot agree with Siemens' argument that the Pm147 radiation is the "underlying basis" on which the SVP is dependent. Accordingly, we agree with the lower court that "it would require a substantial magnification of the role played by the promethium 147 to find that the SVP tubes are 'based on the use of radiations from radioactive substances,' within the purview of the statute." Therefore, we affirm the judgment of the court concerning the item 709.66 issue brought here on cross-appeal by Siemens.

The Item 687.60 Issue

We agree with the lower court's determination of the common meaning of the *eo nomine* provision for "electronic tubes" in item 687.60 and that SVPs fall within that definition and, thus, within item 687.60. Finding no error in the court's disposition of the item 687.60 issue, we adopt that portion of the court's opinion, i.e., Section II, as our own.

The additional criteria desired by the Government require the definition of the term "electronic tube" to include not only electron flow control but also a limitation so that only those electronic devices which have the ability to assist in various functions such as amplification, rectification, conversion, or the like and meet the basic physical configuration are encompassed

by item 687.60 as electronic tubes. Such limitations are too restrictive and uncalled for in light of the technical authorities relied upon by the court below in determining the common meaning of the term "electronic tube."

The Relative Specificity Issue

Since all the imported SVPs are described both under item 685.90 as "apparatus * * * for the protection of electrical circuits" and under item 687.60 as "electronic tubes," the issue of the relative specificity of the two competing provisions, as in the court below, must be reached. In accordance with General Interpretative Rule 10(c), supra note 3, the issue is which of the two competing provisions "most specifically describes" the SVPs. As this court has stated previously, and as the court below properly stated, the provision that more specifically describes the SVPs is the item having requirements which are "more difficult to satisfy." *Ozen Sound Devices v. United States*, 67 CCPA, C.A.D. 1246, 620 F.2d 880, 883 (1980).

Stating that *United States v. Ampex Corp.*, 59 CCPA 134, C.A.D. 1054, 460 F.2d 1086 (1972) was "somewhat analogous"[5] and finding that electronic tubes are "essentially one kind of device" whereas apparatus for the protection of electrical circuits comprises "a number of highly diverse devices," the lower court

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5. While concerned with the issue of relative specificity, the *Ampex* case is of no assistance here since it did not involve an *eo nomine* provision in competition with a use provision. Additionally, the goods described in the more specific provision of *Ampex* (insulated electrical conductors) performed only one function, i.e., conveyance of electricity from one locus to another; whereas here the goods described in the lower court's more specific provision (electronic tubes) perform a "variety of functions."

determined that the "electronic tube" provision was "undoubtedly more restrictive and 'difficult to satisfy.'" *Siemens America,* 496 F. Supp. at 272. We disagree with that determination.

The SVPs are described in item 685.90 by their specific and only use, i.e., circuit protection. Item 687.60 is not limited to any such specific use requirement. Comparing the two competing provisions, both of which are quite broad in their reach, it is clear that the use provision, item 685.90, is "undoubtedly more restrictive and 'difficult to satisfy.'" Therefore, the SVPs are more specifically described in item 685.90.

Our conclusion concerning the relative specificity of the two competing provisions is supported by the general rule of construction that, in the absence of legislative intent to the contrary, a product described by both a use provision and an *eo nomine* provision is *generally* more specifically provided for under the use provision.[6] *Travenol Laboratories, Inc. v. United States,* 67 CCPA , C.A.D. 1247, 622 F.2d 1027 (1980); cf. *United States v. Simon Saw & Steel Co.,* 51 CCPA 33, C.A.D. 834 (1964) (recognizing the general rule but finding the *eo nomine* provision in question to be more specific). In accordance with the construction aid, the SVPs in issue generally will be

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6. There is no requirement that this aid to statutory construction be *automatically* applied when one of the competing provisions is a use provision and the other an *eo nomine* provision. The aid is merely "*a convenient rule of thumb for resolving issues where the competing provisions are otherwise in balance.*" *Simon Saw & Steel Co.,* 51 CCPA 33, 40, C.A.D. 834 (1964) (emphasis in original). Thus the fact that the lower court did not automatically apply the rule is not reversible error *in and of itself* as the Government maintains.

more specifically provided for under the use provision of item 685.90 as "other electrical apparatus * * * for the protection of electrical circuits" than under the *eo nomine* provision of item 687.60 as "electronic tubes."

Other Issues

Siemens had raised two additional issues in the court below, one concerning an alleged improper change in established and uniform practice regarding the duty rate to be applied to the SVPs and the other concerning *stare decisis*. Since the court agreed with Siemens that item 687.60 embraces the SVPs and is more specific than item 685.90, it found no need to reach these issues. However, we have disagreed with the court below by finding item 685.90 more specific than item 687.60. Therefore, these two additional issues need to be reached below before they are properly reviewable here. Thus, we remand this matter to the lower court for consideration of the two additional issues.

Summary

We hold that the SVPs containing Pm147 are not classifiable under item 709.66 as "apparatus based on the use of radiations from radioactive substances." We also hold that although all the SVPs are "electronic tubes" within the meaning of item 687.60, item 685.90 ("other electrical apparatus * * * for the protection of electrical circuits") describes all the SVPs in issue more specifically than item 687.60. Accordingly, we *affirm* the judgment of the court below dismissing Siemens' claim under item 709.66 (Appeal No. 80-35); and we *reverse* the court's judgment holding the SVPs properly dutiable under item 687.60 (Appeal No. 80-33) and *remand* to the U.S. Court of International Trade for further action consistent with this opinion.

Appendix A

MODIFIED AND REMANDED

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Appeal No. 80-33

C.A.D. No. 1266

THE UNITED STATES,

Appellant,

v.

SIEMENS AMERICA, INC. AND SIEMENS CORPORATION,

Appellees.

Appeal No. 80-35

C.A.D. No. 1266

SIEMENS AMERICA, INC. AND SIEMENS CORPORATION,

Appellants,

v.

THE UNITED STATES,

Appellee.

Appendix A

Before MARKEY, Chief Judge, RICH, BALDWIN, MILLER, and NIES, Associate Judges.

NIES, Judge, with whom MARKEY, Chief Judge, joins, dissenting-in-part.

I disagree with the majority only respecting the relative specificity of items 687.60 and 685.90. Admittedly, this case presents a close question, but I see no error in the reasoning of the court below that it is more difficult to satisfy the requirements of a single kind of device (an electron tube) than it is to satisfy the requirements of *any one* of many different kinds of devices (fuses, circuit breakers, lightning arresters, insulators, transformers, carbon block assemblies, carbon arresters, gas tubes, neon bulbs, Zener diodes, varistors, selenium rectifiers, and so forth), especially considering that such highly diverse devices function differently and have no common physical criteria.

Since the *eo nomine* provision in item 687.60 for electronic tubes is more difficult to satisfy than the general catch-all, basket-like provision in item 685.90 covering "other electrical apparatus . . . for the protection of electrical circuits," the construction aid that a use provision is *generally* more specific than an *eo nomine* provision need not be used.

Accordingly I would affirm the judgment of the Court of International Trade in its entirety.

APPENDIX B — DENIAL OF PETITION FOR REHEARING

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Thursday, August 27, 1981

Before: Markey, Chief Judge, Rich, Baldwin, Miller and Nies, Associate Judges.

DECISION WITH PUBLISHED OPINION

No. 80-39. RANK PRECISION INDUSTRIES, INC. v. THE UNITED STATES. Opinion by Miller, Judge. This appeal is from a judgment of the Court of International Trade dismissing appellant's protest without affirming the classification by the District Director of Customs of a television camera lens system under item 708.23 TSUS. The lower court held the merchandise properly classifiable under item 708.89 as argued by the government and denied classification under item 685.10 as argued by the appellant. It was also determined that as of the liquidation date of July 19, 1974, there had been no "finding" of an established and uniform practice of classifying the merchandise as parts of television cameras under item 685.10. Appellant argues that a letter to a third person from the Director of August 31, 1976 constituted a "finding" and that a practice did exist under item 685.10, that the Customs Service was required to liquidate the entries under this item, and that the previous liquidation was invalid.

HELD: We hold that the agency letter referring to "prior liquidation" and to previous classifications brought to the agency's attention by a letter from a third person is acknowledgment that an established and uniform practice was in

effect at the time of the third person's letter. Since the entries in question took place approximately three months after the effective date of the finding of an established and uniform practice, they should have been liquidated under item 685.10 and liquidations under item 708.23 were improper. Accordingly, the judgment of the Court of International Trade is *reversed.*

ACTION IN PENDING CASE

No. 81-8. SYNTEX AGRIBUSINESS, INC. v. U.S. INTERNATIONAL TRADE COMMISSION AND MITSUI AND CO. AND ALPS PHARMACEUTICAL CO., LTD. The petition for writ of mandamus to compel the United States International Trade Commission to institute an investigation under section 337 of the Tariff Act of 1930, as amended, is denied. Opinion by Miller, Judge. Concurring opinion by Judge Nies with whom Judge Baldwin joins.

PETITION FOR REHEARING

No. 80-33. UNITED STATES v. SIEMENS AMERICA, INC., SIEMENS CORPORATION. The petition for rehearing is denied.

August 27, 1981

APPENDIX C — OPINION OF UNITED STATES CUSTOMS COURT

SIEMENS AMERICA, INC.,

Plaintiff,

v.

UNITED STATES,

Defendant.

Before NEWMAN, JUDGE

Consolidated Court No. 72-5-01093

Surge voltage protectors

APPARATUS BASED ON THE USE OF RADIATIONS FROM RADIOACTIVE SUBSTANCES—ITEM 709.66, TSUS—"BASED ON"

Congress, by using the words "based on" in item 709.66, TSUS, intended to embrace apparatus in which radiation from radioactive substances is its *sine qua non*, viz., the radioactive substance must be a fundamental and essential element or constituent of the apparatus.

SAME—GAS TUBE SURGE VOLTAGE PROTECTORS

The record fails to establish that the radioactive substance contained in the imported gas tube surge voltage protectors constitutes a fundamental and essential element or constituent of the devices. Although plaintiff proved that the radioactive

substance preionizes the inert gas in the tubes and helps stabilize the breakdown voltage, the evidence further shows that the gas ionizes when voltage is applied irrespective of the presence of a radioactive material; that breakdown voltage is determined primarily by the electrode spacing and gas fill pressure, rather than radiation; that many SVP tubes are manufactured without radioactive materials; and that the inclusion of a radioactive substance in the present tubes was not essential to their basic function of over-voltage protection. Under these facts and circumstances, the Court finds that the imports are not classifiable under item 709.66, TSUS, as apparatus based on the use of radiations from radioactive substances. *Cf. Pharmacia Laboratories, Inc. v. United States*, 67 CCPA ___, C.A.D. 1235, 609 F. 2d 491 (1979).

COMMON MEANING

In the absence of a special commercial designation the language of a tariff statute is to be construed in accordance with its common meaning. Moreover, the common meaning of a tariff term is a matter of law to be determined by the Court; and in making such determination, the Court may rely upon its own understanding of the word or term used and may consult standard lexicographic and scientific authorities. Further, the testimony of witnesses respecting common meaning is advisory only and has no binding effect on the Court. *United States v. National Carloading Corp. et al.*, 48 CCPA 70, C.A.D. 767 (1961); *United States v. E. Besler & Company et al.*, 64 CCPA 121, 124, C.A.D. 1193, 557 F. 2d 270 (1977); *United States v. Corning Glass Works*, 66 CCPA ___, C.A.D. 1216, 586 F. 2d 822 (1978); *Ozen Sound Devices v. United States*, 67 CCPA ___, C.A.D. 1246, ___F. 2d___, (1980).

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SAME—TECHNICAL TERMS

Where the common meaning of a technical term is in issue, reliance should not be confined to general lexicons, but technical dictionaries should be consulted. *Brown Boveri Corp. et al. v. United States*, 53 CCPA 19, C.A.D. 870 (1966); *United States v. The Spiegel Bros. Corp.*, 51 CCPA 69, C.A.D. 839 (1964); *Firth Sterling, Inc. v. United States*, 48 CCPA 130, C.A.D. 779 (1961); *F. W. Woolworth Company v. United States*, 67 Cust. Ct. 9, C.D. 4245 (1971).

COMMON MEANING—"ELECTRON TUBE"—ITEM 687.60, TSUS

The lexicographic authorities relied upon by plaintiff define "electron tube" in terms of rudimentary but essential features: an airtight enclosure, evacuated or gas-filled, providing a medium for the flow and conduction of electrons between two electrodes. The SVP tubes satisfy these basic criteria of an electron tube.

EO NOMINE DESIGNATION—SCOPE OF

An *eo nomine* designation without limitation includes all forms of the article. *United States v. National Carloading Corp. et al.*, 48 CCPA 70, C.A.D. 767 (1961). Hence, the *eo nomine* provision for "electronic tubes" in the superior heading to item 687.60 includes all forms of such tubes.

RELATIVE SPECIFICITY—GENERAL INTERPRETATIVE RULE 10(c)

Under rule 10(c), the provision that more specifically describes the SVP tubes is "the item having requirements which

are 'more difficult to satisfy'." *F. L. Smidth & Company v. United States*, 56 CCPA 77, 85, C.A.D. 958, 409 F. 2d 1369 (1969); *Ozen Sound Devices v. United States*, 67 CCPA ___, C.A.D. 1246, ___F. 2d___ (1980). The *eo nomine* provision for "electronic tubes" in item 687.60, TSUS, is plainly more restrictive and "difficult to satisfy" than the provision for "apparatus * * * for the protection of electrical circuits" in item 685.90, TSUS.

[Judgment for plaintiff.]

Decided May 13, 1980

Freeman, Meade, Wasserman & Schneider, Esqs. (Messrs. *Louis Schneider* and *Kenneth Nathan Wolf* of counsel) for the plaintiff.

Alice Daniel, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation, and *Madeline B. Kuflik*, trial attorney, Esqs., for the defendant.

NEWMAN, Judge: In these consolidated cases, plaintiff challenges the classification by Customs of certain gas tube surge voltage protectors ("SVPs") exported from West Germany on various dates from 1969 to 1978, and entered at the port of New York.

The merchandise in issue was classified under the provision in item 685.90 of the Tariff Schedules of the United States (TSUS) for "other electrical apparatus * * * for the protection of electrical circuits" and assessed duty at the rate of 14, 12, 10 or 8.5 per centum ad valorem, depending upon the year of entry, pursuant to T.D. 68-9. Plaintiff claims that the imports are

properly dutiable under the provision in item 709.66, TSUS, for "Apparatus based on the use of radiations from radioactive substances" at the rate of 9.5, 8, 7 or 6 per centum ad valorem, depending upon the year of entry, pursuant to T.D. 68-9.[1] Alternatively, plaintiff claims that the merchandise is dutiable as "Other" electronic tubes under item 687.60, TSUS, at the rate of 10, 8.5, 7 or 6 per centum ad valorem, depending upon the year of entry, pursuant to T.D. 68-9.

Plaintiff's alternative claim under item 687.60, TSUS, is sustained, for the reasons indicated hereinafter.

STATUTES INVOLVED

Tariff Schedules of the United States, 19 U.S.C. § 1202:

Classified under:

Schedule 6, Part 5. — ELECTRICAL MACHINERY AND EQUIPMENT

Part 5 headnotes:

1. This part does not cover —

* * * * *

---

1. Plaintiff (brief, p. 8, n. 3) has abandoned this claim respecting SVP tube #A52-C35OX. Accordingly, these consolidated cases are dismissed as to that merchandise.

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(vi) electrical instruments and apparatus provided for in schedule 7.

* * * * *

685.90 Electrical switches, relays, fuses, lightning arresters, plugs, receptacles, lamp sockets, terminals, terminal strips, junction boxes and other electrical apparatus for making or breaking electrical circuits, for the protection of electrical circuits, or for making connections to or in electrical circuits; switchboards (except telephone switchboards) and control panels; all the foregoing and parts thereof . . . . . [14, 12, 10 or 8.5% ad val., depending on the year of entry]

Claimed under:

Schedule 7, Part 2, Subpart B. — Medical and Surgical Instruments and Apparatus; X-Ray Apparatus

* * * * *

Apparatus based on the use of X-rays or of the radiations from radioactive substances, whether for medical, industrial, or other uses, and parts thereof:

* * * * *

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709.66 Apparatus based on the use of radiations from radioactive substances, and parts thereof ..... [9.5, 8, 7 or 6% ad val., depending on the year of entry]

Alternatively claimed under:

Schedule 6, Part 5. — ELECTRICAL MACHINERY AND EQUIPMENT

* * * * *

Electronic tubes (except X-ray tubes); photocells; transistors and other related electronic crystal components; mounted piezo-electric crystals; all the foregoing and parts thereof:

* * * * *

687.60 Other ..... [10, 8.5, 7 or 6% ad val., depending on the year of entry]

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THE FACTS[2]

The SVPs in issue are hermetically sealed gas discharge tubes consisting of two electrodes, a glass insulator filled with argon (an inert gas), and a minute quantity of promethium 147 (a radioactive material). In the electronics field, SVP tubes are called "cold cathode tubes", "gas discharge tubes" and "gas spark gap tubes" (R. 38). The function of the subject SVP tubes is to provide a conductive path for unwanted and excessive voltage transients,[3] thereby preventing the transient energy and associated voltages from damaging electric circuitry and causing harm to personnel.

SVPs are designed to switch rapidly at a specific voltage level, referred to as the "breakdown voltage", from a non-conductive state to a conductive state when subjected to an excessive voltage transient. As the voltage across an SVP tube increases, ionization of the inert gas occurs and the tube

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2. The record consists of two witnesses for plaintiff: Uwe Renken (plaintiff's import-export traffic manager) and Ludwig Rademacher (plaintiff's production manager in Sonora, Mexico) plus ten exhibits; and three witnesses for defendant: Richard Knapp (an electrical engineer and supervisor of special services at New York Telephone), Lewis Douglas Sweeney (sales manager for Joslyn Electronics, a supplier of surge voltage protectors, and formerly plaintiff's operations manager for surge voltage protectors and mylar capacitors), and Leonard Strauss (professor of electrical engineering and electophysics at the Polytechnic Institute of New York) plus three exhibits.

3. These voltage transients are generated by both natural and manmade sources, such as lightning, interruption of current in motors, transformers, solenoids and relays, powerline shorts and other sources (defendant's exhibit B, p. 2).

becomes conductive. The flow of electrons within the tube cannot be controlled. Promethium 147, a radioactive material contained within the instant tubes (except tube #A52-C35OX), emits beta particles (radiation) which "preionize" or facilitate the ionization of the gas in the tubes and stabilize the breakdown voltage. However, the breakdown voltage is a design parameter controlled primarily by the electrode spacing and gas fill pressure of the SVP tubes, and there are many surge-protective tubes manufactured without radioactive materials.

QUESTION PRESENTED

Are the imported SVPs properly classifiable under either item 709.66, TSUS, or item 687.60, TSUS, as alternatively claimed by plaintiff?

OPINION

I

Since the record clearly establishes that the SVP tubes are used for the protection of electric circuits [4] (R. 54, 172-173, 192, defendant's exhibit A), the merchandise is described in item 685.90, TSUS, as classified by Customs. However, classification under item 685.90 is precluded by headnote 1(vi) of Schedule 6, Part 5 if the merchandise is described in item 709.66, TSUS, the provision primarily claimed by plaintiff to be applicable.

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4. The fact that the SVPs are used for the protection of electric circuits is conceded in plaintiff's exhibit 4 (p. 2), a letter from plaintiff's former counsel to the Bureau of Customs (now Customs Service) requesting a classification ruling for the tubes.

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To be classifiable under item 709.66, the SVP tubes must be "based on the use of radiations from radioactive substances". As noted *supra*, the imported tubes contain the radioactive substance promethium 147 (R. 36-37, 146). Nevertheless, I have concluded that the imports are not "based on" the use of radiations from radioactive substances.

In *Webster's New International Dictionary* (2d ed. 1957), the word "base" is defined as: "2. Figuratively, the fundamental or essential part of a thing; essential principle; groundwork. * * * 4. a The main or chief ingredient of anything, viewed as its fundamental element or constituent". Thus, the language "based on" as contained in item 709.66 evinces Congressional intent to embrace merchandise in which radiation from radioactive substances is its *sine qua non*.[5] I find that radiation is not the *sine qua non* of the SVP tubes in issue, since the promethium 147 is not a fundamental and essential constituent of these tubes.

The record is clear that the specific function of the subject SVP tubes is to provide a conductive path for excessive voltage transients, and that such function of over-voltage protection is not based upon the use of a radioactive material (R. 51-52, 194). Promethium 147, the radioactive component in the imported tubes, "preionizes" the gas in the tubes[6] and stabilizes the

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5. See the discussion of apparatus based on the use of radiations from radioactive substances in the *Summaries of Trade and Tariff Information* (1970), Schedule 7, Volume 2, p. 95.

6. The promethium 147 provides a certain level of energy to the gas which merely increases the speed of ionization (R. 198-199). This function of the radioactive material is analogous to the function of a catalyst in a chemical reaction. (See plaintiff's exhibit 3, p. 2.)

breakdown voltage[7] (R. 125-126, 137, 147-148, 170, 193, 198-199, 214, 226). Nevertheless, the unrebutted testimony of defendant's expert witnesses shows that the gas in the SVP tubes ionizes when voltage is applied, irrespective of the presence of a radioactive substance (R. 171-172, 227-228), and that speed of ionization and a specific breakdown voltage can be achieved by means other than the use of radioactive substances. Defendant's witnesses testified, without contradiction or rebuttal, that breakdown voltage in the SVP tubes is determined primarily by the electrode spacing and the gas fill pressure, rather than radiation (R. 126-127, 191, 194-195, 198-200, 202, 212). Significantly, that testimony is corroborated by plaintiff's own promotional brochure (defendant's exhibit B, p. 2), which states:

> The DC breakdown voltage is a design parameter controlled by the manufacturer, and *is a function primarily of the electrode spacing and the gas fill pressure.* [Emphasis added.]

Similarly, plaintiff's exhibit 12, a technical data sheet concerning Joslyn miniature gas-tube surge protectors, reads:

> When a surge exceeds the breakdown voltage of the tube (surge sparkover voltage), the gap becomes intensively ionized, and conduction

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7. In technical terms, the D.C. breakdown voltage is defined as: "The voltage at which an abrupt transition of the gap resistance from a practically infinite value ($\geq$ 10,000 megohm) to a relatively low value (approx. O Ohm) occurs, when subject to a slowly rising voltage (1000V/sec or less)". (Defendant's exhibit B, p. 7) More simply stated, the breakdown voltage is "the point at which the gas turns from a non-conductive to a conductive state" (R. 124).

> takes place within a fraction of a microsecond. The ionized protector becomes a short circuit and remains so until the voltage returns to normal. *Ionization and deionization are extremely fast due to the type of gas fill and physical configuration used.* [Emphasis added.]

Like the Siemens tubes in issue, the Joslyn tubes described in plaintiff's exhibit 12 contain a radioactive material (tritium) (R. 164-166). However, the radioactive component of the Siemens and Joslyn tubes is not mentioned in the descriptive promotional literature (defendant's exhibit B and plaintiff's exhibit 12). Hence, it is evident that neither plaintiff nor Joslyn regarded the radioactive component of its tubes as an important feature.

Concededly, there are many SVP tubes manufactured without radioactive materials. For example, plaintiff admits (reply brief, p. 2, n. 1) that SVP tube model #A52-C in entry No. K213581 does not contain any radioactive material. Moreover, defendant's exhibit C, the *IEEE Standard Test Specifications for Gas Tube Surge-Protective Devices* (1977), published by The Institute of Electrical and Electronics Engineers, Inc., states (at p. 7): "3.2.3 Radiation. *Some* devices *may* contain irradiated material; when these are used in nuclear facilities, special consideration may be necessary". (Emphasis added.) This statement clearly demonstrates that only "some" gas tube surge-protective devices utilize radioactive substances. Significantly too, the definition of "gas tube surge arrester" found in the IEEE test specifications (exhibit C, p. 6) does not even mention or imply the use of radiation (R. 133). Plainly, then, the inclusion of a radioactive substance in the present SVP tubes was not essential to their basic function of over-voltage protection.

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As analogous to the situation presented in the instant case, defendant calls attention to *Pharmacia Laboratories, Inc. v. United States*, 67 CCPA ___, C.A.D. 1235, 609 F. 2d 491 (1979), wherein the sole issue presented was whether certain imported radioimmunoassay diagnostic test kits were classifiable as "usefully radioactive compounds" under item 494.50, TSUS. Citing Judge Watson's finding that the kits contained nonradioactive components which were *as important* as the radioactive component, Chief Judge Markey concluded that the kits could not be classified under item 494.50. Here, respecting even the characteristic of breakdown voltage, the record shows that electrode spacing and gas fill pressure are the primary determinants.

In sum, plaintiff's proof that the imported SVP tubes utilize a radioactive material is not sufficient to sustain its burden of proof under item 709.66 absent further evidence showing that the radioactive material is a fundamental and essential component of the merchandise. In the present case, it would require a substantial magnification of the role played by the promethium 147 to find that the SVP tubes are "based on the use of radiations from radioactive substances," within the purview of the statute. Accordingly, plaintiff's primary claim under item 709.66, TSUS, is without merit.

II

We now turn to plaintiff's alternative claim that the merchandise falls within the *eo nomine* provision for "electronic tubes" in item 687.60, TSUS.

Fundamentally, in the absence of a special commercial designation, the language of a tariff statute is to be construed in

accordance with its common meaning. Moreover, the common meaning of a tariff term is a matter of law to be determined by the Court; and in making such determination, the Court may rely upon its own understanding of the word or term used and may consult standard lexicographic and scientific authorities. Further, the testimony of witnesses respecting common meaning is advisory only and has no binding effect on the Court. *United States v. National Carloading Corp. et al.*, 48 CCPA 70, C.A.D. 767 (1961); *United States v. E. Besler & Company et al.*, 64 CCPA 121, C.A.D. 1193, 557 F. 2d 270 (1977); *United States v. Corning Glass Works*, 66 CCPA ___, C.A.D. 1216, 586 F. 2d 822 (1978); *Ozen Sound Devices v. United States*, 67 CCPA ___, C.A.D. 1246, ___F. 2d___ (1980).

As indicative of the common meaning of the term "electronic tube", defendant quotes the following definitions:

> *Brittania World Language Dictionary*, Volume 51 at p. 407:
>
> Electron tube is a high vacuum tube in which a stream of electrons is emitted from a heated cathode and subjected to the controlling action of a grid which amplifies and directs the current.
>
> *Webster's Third New International Dictionary*, Unabridged (1963):
>
> An electronic device in which conduction by electrons takes place through a vacuum or a gaseous medium between a sealed glass or a metal container, and which has various uses (as amplification of electrical energy and the

conversion of alternating current to direct current and vice versa) that are based on the controlled flow of electrons.

Predicated upon the above-quoted definitions and the testimony of its expert witnesses, defendant urges that the SVPs are not "electron tubes"[8] within the common meaning of that term since the imports do not "control" the flow of electrons and they do not perform the varied functions of amplification, conversion, rectification, etc. In essence, defendant maintains that the scope of item 687.60 is restricted to those devices which perform the functions and have the physical configuration stated in the definitions submitted.

Plaintiff, in support of its contention that the SVPs fall within the common meaning of "electron tube", has cited definitions of that term set forth in several technical lexicographic authorities, which definitions are broader in application than the restrictive definitions proffered by defendant. The field of electronics is, of course, a technical one, and therefore the common meaning of the tariff term "electronic tube" should be determined in that context. A long line of authorities teaches that in instances where the common meaning of a technical term is in issue, as here, reliance should not be confined to general lexicons, but technical dictionaries should be consulted. *Brown Boveri Corp. et al. v. United States*, 53 CCPA 19, C.A.D. 870 (1966); *United States v. The Spiegel Bros. Corp.*, 51 CCPA 69, C.A.D. 839 (1964); *Firth Sterling, Inc. v. United*

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8. As correctly pointed out by plaintiff, the terms "electronic tubes", as set forth in item 687.60, TSUS, and "electron tubes" are interchangeable. See Markus, *Electronics Dictionary* (4th ed. 1978), p. 218-219.

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States, 48 CCPA 130, C.A.D. 779 (1961); *F. W. Woolworth Company v. United States*, 67 Cust. Ct. 9, C.D. 4245 (1971).

As noted *supra*, the record shows that the SVP tubes are known as "cold cathode tubes", "gas discharge tubes" and "gas spark gap tubes" (R. 38, 93, 197). Technical authorities provide the following pertinent definitions:

IEEE Standard Dictionary of Electrical and Electronics Terms (2d ed. 1977):

> *electron tube.* An electron device in which conduction by electrons takes place through a vacuum or gaseous medium within a gastight envelope. * * *
>
> *cold cathode tube.* An electron tube containing a cold cathode.
>
> *gas tube.* An electron tube in which the pressure of the contained gas or vapor is such as to affect substantially the electrical characteristics of the tube.

Modern Dictionary of Electronics (4th ed. 1972):

> *electron tube*—An electron device in which the electrons move through a vacuum or gaseous medium within a gastight envelope.
>
> *cold-cathode tube*—An electron tube containing a cathode which will emit electrons without being heated.

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gas tube—A partially evacuated electron tube containing a small amount of gas. Ionization of the gas molecules is responsible for the current flow.

Dictionary of Science and Technology (1971):

electron tube or valve (Electronics). In U.S., any electron device in which the electron conduction is in a vacuum or gas inside a gas-tight enclosure.

Markus, *Electronics Dictionary* (4th ed. 1978):

electron tube An electron device in which conduction of electricity is provided by electrons moving through a vacuum or gaseous medium within a gastight envelope. A tube may provide rectification, amplification, modulation, demodulation, oscillation, limiting, *and a variety of other functions.* Examples include cathode-ray tubes, gas tubes, phototubes, and vacuum tubes. Also called electronic tube, radio tube, tube, and valve (British). [Emphasis added.]

In addition to the foregoing definitions in technical authorities, plaintiff cites the following definition in *The Random House Dictionary of the English Language* (Unabridged 1966 ed.):

electron tube. See *vacuum tube.*

vacuum tube, * * * 2. a sealed glass tube containing a partial vacuum or a highly rarefied

> gas, in which may be observed the effects of a discharge of electricity passed through the tube between electrodes leading into it. Also called *electron tube;* * * *.

The lexicographic authorities relied upon by plaintiff define "electron tube" in terms of rudimentary but essential features: an airtight enclosure, evacuated or gas-filled, providing a medium for the flow and conduction of electrons between two electrodes. Plainly, the SVP tubes satisfy these basic criteria of an electron tube (R. 38). Equally important, the record establishes that the imports are "cold cathode tubes", which by definition are electron tubes.

At the trial, defendant's witness Strauss testified that there are many types of electron tubes (R. 202), and it is well settled that an *eo nomine* designation without limitation includes all forms of the article. *United States v. National Carloading Corp. et al.*, 48 CCPA 70, C.A.D. 767 (1961). Hence, the *eo nomine* provision for electronic tubes, in the superior heading to item 687.60, includes all forms of such tubes.

III

To recapitulate briefly, the SVP tubes are clearly described in the TSUS as both "apparatus * * * for the protection of electrical circuits" under item 685.90, and as "electronic tubes" under the superior heading to item 687.60. Thus, an issue of relative specificity of the two competing provisions is posed by virtue of General Interpretative Rule 10(c) which, so far as pertinent, reads:

> (c) an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it; * * *

In *F. L. Smidth & Company v. United States*, 56 CCPA 77, 85, C.A.D. 958, 409 F. 2d 1369 (1969), the Court of Customs and Patent Appeals construed the above-quoted statutory rule of relative specificity as follows:

> This [interpretative rule] appears to us to mean this: if an article is determined to be clearly described in two or more [tariff schedule] items, selection of the controlling item by relative specificity is mandatory and takes precedence over other judge-evolved methods of resolving ambiguity, including resort to extrinsic aids such as legislative history.

Under rule 10(c), the provision that more specifically describes the SVP tubes is "the item having requirements which are 'more difficult to satisfy'." *Smidth, supra*, 56 CCPA at 85; *Ozen Sound Devices, supra*. The *eo nomine* provision for "electronic tubes" is undoubtedly more restrictive and "difficult to satisfy" than the provision for "apparatus * * * for the protection of electrical circuits". Electronic tubes, although performing a variety of functions, are essentially one kind of device. Apparatus for the protection of electrical circuits, on the other hand, are comprised of a number of highly diverse devices, such as fuses (R. 172, 179, 206), circuit breakers, lightning arresters (R. 85), insulators, transformers (R. 181-182), carbon block assemblies (R. 76, 96), carbon arresters (R. 121, 168), gas tubes, neon bubbles (R. 84, 172), zener diodes, varistors,

selenium rectifiers (R. 168), etc. Such heterogeneous devices perform different functions in circuit protection, and have no common physical criteria.

United States v. Ampex Corp. et al., 59 CCPA 134, C.A.D. 1054, 460 F. 2d 1086 (1972) is somewhat analogous to the instant case respecting the issue of relative specificity. There, the competing provisions were item 685.20 (television apparatus) and item 688.15 (insulated electrical conductors). Addressing the issue of relative specificity, the Appellate Court commented (59 CCPA at 137):

> On that issue [relative specificity], we agree with dissenting Judge Newman that:
>
> > Insulated electrical conductors, *although taking a variety of forms*, are essentially one kind of device. Television apparatus, on the other hand, is comprised of an *entire group of varied kinds of devices* * * *. [Emphasis added.]

And *cf. Stella D'Oro Biscuit Co., Inc. v. United States*, 79 Cust. Ct. 28, C.D. 4709 (1977), *aff'd per curiam*, 65 CCPA 52, C.A.D. 1205, 570 F. 2d 945 (1978).

IV

Finally, plaintiff contends that the SVP tubes are properly classifiable under item 687.60, TSUS, on the basis that there was an established and uniform practice by Customs of classifying the tubes under that provision, which practice was changed without the requisite notice in contravention of 19 U.S.C. §

1315(d).[9] Additionally, plaintiff relies upon the doctrine of *stare decisis* and cites three "abstract" decisions of the Customs Court holding that the SVP tubes were properly dutiable under item 687.60 rather than item 685.90. Abstracts P73/89, P73/104 and P73/121 (70 Cust. Ct. 393, 396 and 399 (1973)). These three cases were submitted by the parties on an agreed statement of facts and the classification under item 687.60 were conceded by defendant without trial or briefing.

Since I agree with plaintiff's arguments that the common meaning of "electronic tubes" embraces the SVPs in issue and that item 687.60 is more specific than item 685.90, there is no need to address the issues raised by plaintiff concerning the Government's alleged change in administrative practice in classifying the SVP tubes under item 687.60 and *stare decisis*.

CONCLUSION

For the reasons stated herein, plaintiff's alternative claim under item 687.60, TSUS, is sustained, but plaintiff's primary claim under item 709.66, TSUS, is dismissed. Judgment will be entered accordingly.

BERNARD NEWMAN
J.

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9. In support of its claim under 19 U.S.C. § 1315(d), plaintiff introduced in evidence a letter from the Bureau of Customs (now Customs Service) dated July 25, 1970 ruling that the SVP tubes are classifiable as electronic tubes under item 687.60 (plaintiff's exhibit 3), and also the testimony of its witness Renken that approximately 100 shipments entered by plaintiff over a two-year period were classified and liquidated by Customs under item 687.60 (R. 16). Plaintiff argues that the challenged assessments under item 685.90 constitute the imposition of a higher rate of duty than the Secretary of the Treasury had found applicable to the merchandise under an established and uniform practice without the notice required by the statute.

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Schedule of Cases
Consolidated Under Court No. 72-5-01093

Port of New York

Siemens America, Inc.

Court No.	Protest No.	Entry No.
72-5-01093	09445	K137378
	09446	K603828
	10692	K104540
		K108688
		K101135
	10693	K101709
		K103862
		K114140
	14246	K141635
		K149327
		K109325
		K114134
	14247	K142178
		K148537
		K137050
		K138468
	14248	K107804
		K102959

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Court No.	Protest No.	Entry No.
	14466	K159752
		K125169
		K225271
	09444	K127077
		K123345
		K132631

Siemens Corporation

Court No.	Protest No.	Entry No.
75-2-00460	1001-4-002657	K182318
	1001-4-005621	K182324
	1001-4-006350	K173663
		K120514
		K182437
		K261770
		K225815
		K246552
	1001-4-010954	K190866
	1001-3-019489	K258076
		K297930
		K297228
		K315204
		K301243
		K322052

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Court No.	Protest No.	Entry No.
		K326524
		K330412
		K362967
		K341076
		K240359
75-5-01111	1001-4-011914	K345703
	1001-4-005962	K148236
		K276275
76-1-00048	1001-4-006348	K164792
		K136621
	1001-4-002587	K151707
		K153628
		K156881
		K145558
		K335029
		K374969
	1001-4-001792	K352968
		K180696
		K220780
	1001-4-006349	K268963
		K356190
		K121746
		K178421
		K167573

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Court No.	Protest No.	Entry No.
		K327381
		K175367
	1001-4-010524	K383149
		K199260
		K189851
		K269149
		K155168
	1001-4-007585	K130877
		K211662
		K251079
		K383149
		K166469
		K119810
		K153828
		K332802
		K253951
		K129930
76-6-01463	1001-4-020366	K115780
		K147441
	1001-5-014797	K281463
		K326946
		K355008
		K104992
	1001-5-012448	K356379
		K302360
		K137050

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Court No.	Protest No.	Entry No.
76-11-02526	1001-5-013925	K313800
		K104260
		K391901
		K335394
		K272636
		K144786
		K142058
		K143902
	1001-6-003439	K318696
		K310354
	1001-6-005571	K372551
		K403474
77-8-01535	1001-6-001731	K257327
		K290475
77-8-01876	1001-6-006720	K359680
		K417216
77-11-04792	1001-5-009481	K182981
		K327448
		K316211
		K322286
		K277416
		K314125
		K282578

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Court No.	Protest No.	Entry No.
	1001-5-013306	K209803
		K222045
		K214340
		K304646
		K246651
		K170100
		K296119
		K352171
		K110687
78-2-00251	1001-5-004091	K100689
	1001-7-005143	K342119
	1001-7-005528	K165767
78-8-01474	1001-7-008132	K100334
		K109771
	1001-7-008859	K133338
	1001-7-007482	K437760
		K443306
		K444568
		K465787
	1001-7-008521	K396541
		K450850
		K436801
		K117500

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Court No.	Protest No.	Entry No.
	1001-7-004407	K311577
		K208809
		K189008
		K290566
		K148343
		K138917
	1001-8-000501	K154237
		K164497
		K168976
	1001-8-001043	K119351
		K152769
78-11-01986	1001-8-001704	K151959
	1001-8-000212	K130300
		K376150
		K151399
	1001-8-002959	K277242
		K187521
		K212279
		K213581
		K224173
	1001-8-002960	K230461
		K226990
		K226989
		K249151

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Court No.	Protest No.	Entry No.
		K249296
		K225066
78-12-02283	1001-8-005249	K212600
		K245867
		K255787
		K269166
		K268897
		K264466
		K273868
	1001-8-005250	K270340
		K277835
		K2[illegible]96
		K300040
		K297342
		K311226
	1001-8-005252	K453520
		K470132
		K470900
		K475660
		K314608

Appendix C

JUDGMENT

UNITED STATES CUSTOMS COURT

BERNARD NEWMAN, JUDGE

SIEMENS AMERICA, Inc.,

Plaintiff,

v.

UNITED STATES,

Defendant.

Consolidated Court No. 72-5-01093

This case having been duly submitted for decision and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED: that the surge voltage protectors (SVPs) covered by this consolidated action, assessed with duty at the rate of 14, 12, 10 or 8.5 per centum ad valorem, depending upon the year of entry, pursuant to item 685.90, TSUS, as modified by T.D. 68-9, are properly dutiable at the rate of 10, 8.5, 7 or 6 per centum ad valorem, depending upon the year of entry, pursuant to item 687.60, TSUS, as modified by T.D. 68-9. Plaintiff's claim under item 709.66, TSUS, is dismissed; this consolidated action is also dismissed respecting SVP tube #A52-C35OX.

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The regional commissioner of customs at the port of New York is directed to reliquidate the entries accordingly.

BERNARD NEWMAN
Judge of the United States Customs Court.

Dated at New York, N.Y.,
May 13, 1980

APPENDIX D — STATUTES NOT IN ISSUE

SCHEDULE 6 — METALS AND METAL PRODUCTS

Part 5 — ELECTRICAL MACHINERY AND EQUIPMENT

* * *

Calculating machines; accounting machines, cash registers, postage-franking machines, ticket-issuing machines, and similar machines, all the foregoing incorporating a calculating mechanism:

676.15 Accounting, computing, and other data-processing machines.

* * *

Generators, motors, motor-generators, converters (rotary or static), transformers, rectifiers, and rectifying apparatus, and inductors; all the foregoing which are electrical goods, and parts thereof:

Transformers:

682.05 Rated at less than 1 kva. . . . .

682.07 Other . . . .

* * *

682.60 Other . . . .

* * *

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Radiotelegraphic and radiotelephonic transmission and reception apparatus; radio-broadcasting and television transmission and reception apparatus, and parts thereof:

* * *

685.20 Television apparatus, and parts thereof.

Other:

* * *

685.29 Citizens Band (CB) radio transceivers (except hand-held)

* * *

685.80 Electrical capacitors, fixed or variable . . . .

* * *

686.10 Resistors, fixed or variable (including potentiometers but not including heating elements), and parts thereof . . . .

* * *

Automatic voltage and voltage-current regulators, with or without cut-out relays, and parts thereof:

686.22 Designed for use in a 6-volt, 12-volt or 24-volt system . . . .

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* * *

686.24 Other . . . .

* * *

SCHEDULE 7 — SPECIFIED PRODUCTS: MISCELLANEOUS AND NONENUMERATED PRODUCTS

Part 2 — OPTICAL GOODS; SCIENTIFIC AND PROFESSIONAL INSTRUMENTS; WATCHES, CLOCKS, AND TIMING DEVICES; PHOTOGRAPHIC GOODS; MOTION PICTURES, RECORDINGS AND RECORDING MEDIA

Electromedical apparatus, and parts thereof:

709.15 Electrosurgical apparatus, and parts thereof . . . .

709.17 Other . . . .

* * *

Electrical measuring, checking, analyzing, or automatically controlling instruments and apparatus, and parts thereof: . . . .

712.05 Optical instruments or apparatus, and parts thereof . . . .

Other:

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Ships' logs, and depth-sounding instruments and apparatus, and parts thereof: ....

712.10 Instruments and apparatus ....

712.12 Parts ....

712.15 Instruments and apparatus for measuring or detecting alpha, beta, gamma, X-ray, cosmic or similar radiations, and parts thereof.

712.20 Seismographs and parts thereof ....

Anemometers, and parts thereof:

712.25 Anemometers ....

712.26 Parts ....

712.47 Automatic flight control instruments and apparatus designed for use in aircraft, and parts thereof.

712.49 Other ....

712.51 If Canadian article and original motor-vehicle equipment (see headnote 2, part 6B, schedule 6).

THE BRUSSELS TARIFF NOMENCLATURE

Heading 85.19

85.19 Electrical apparatus for making and breaking electrical circuits, for the protection of electrical

circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, lightning arresters, surge suppressors, plugs, lampholders, terminals, terminal strips and junction boxes); resistors, fixed or variable (including potentiometers), other than heating resistors; rheostatic, inductance, motor driven and vibrating contact automatic voltage regulators; switchboards (other than telephone switchboards) and control panels

THE BRUSSELS TARIFF NOMENCLATURE

Heading 85.21

85.21 Thermionic, cold cathode and photocathode valves and tubes (including vapour or gas filled valves and tubes, cathode-ray tubes, television camera tubes and mercury arc rectifying valves and tubes); photocells; crystal diodes, crystal triodes and other crystal valves (for example, transistors); mounted piezo-electric crystals